Yupaporn Seangarthit v Neil Allan Campbell Webb

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPLICATION NO B–08–11 OF 1995
MAHADEV SHANKAR, ZAKARIA YATIM AND NH CHAN JJCA
20 FEBRUARY 1995

Civil Procedure *— Appeal — Leave to appeal — Application for — Whether effect of amendment to O 49 r 6 is to dispense with need to file a memorandum of appeal — Whether O 49 r 6 has abrogated the requirement of O 55 r 2 — Subordinate Courts Rules 1980 O 49 r 6 — Rules of the High Court 1980 O 55 r 2*

Civil Procedure *— Appeal — Memorandum of appeal — Whether need to file within 14 days of receiving form 141 — Whether application should be for extension of time to file memorandum of appeal instead of for leave to appeal — Subordinate Courts Rules 1980 O 49 r 6 — Rules of the High Court 1980 O 55 r 2*

The respondent sued the appellant in the magistrates' court based on an alleged breach of contract. The appellant filed a defence and counterclaim. The respondent, however, applied and obtained summary judgment on 19 November 1993, pursuant to O 26 of the Subordinate Courts Rules 1980 ('the SCR'). On 29 November 1993, the appellant filed and served her notice of appeal. On 15 December 1993, she filed her appeal record pursuant to O 49 r 6 of the SCR. On 27 December 1993, the senior assistant registrar of the High Court sent a letter to the solicitors of both parties to say that the record had been received on 15 December 1993. The appeal was subsequently fixed for disposal on 7 December 1994. On 6 December 1994, the respondent's solicitors served a written notice that they want to take a preliminary objection to the appeal on the ground that the memorandum of appeal had not been served pursuant to O 55 of the Rules of the High Court 1980 ('RHC'). At the hearing, the appellant's counsel submitted that the effect of O 49 r 6(3) of the SCR was to dispense with the need of a memorandum of appeal since the appeal was merely by way of a rehearing of the respondent's application, and there had been no trial since it was an interlocutory application. However, the trial judge dismissed the appeal with costs. Therefore, the appellant applied for leave to appeal against the decision of the High Court.

Held, dismissing the application:

(1) The objective of the amendment to O 49 r 6 of the SCR was to reduce the delay caused in the registration of appeals by the non-availability of the grounds of decision and notes of evidence which can take a long time in the lower courts. This does not mean that the effect of the order is to dispense with the need for a memorandum of appeal. Although O 49 r 6(3) of the SCR could have been more clearly worded, it does not mean that it has abrogated the requirement of O 55 r 2 of the RHC.

(2) Therefore, when form 141 was served on the appellant's solicitors on 3 January 1994, they should have followed up by filing and serving the memorandum of appeal within 14 days thereafter together with a copy of the appeal record. In the circumstances, it is not fit to give leave to appeal here. In fact, the proper application should be for an extension of time to file the memorandum of appeal, and that application should have been made in the High Court.

[Bahasa Malaysia summary

Penentang telah mendakwa perayu dalam mahkamah majistret berdasarkan satu keingkaran kontrak. Perayu telah memfailkan satu pembelaan dan tuntutan balas. Penentang, walau bagaimanapun, telah memohon dan memperolehi penghakiman terus pada 19 November 1993, di bawah A 26 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR itu'). Pada 29 November 1993, perayu telah memfailkan dan menyampaikan notis rayuannya. Pada 15 Disember 1993, dia telah memfailkan rekod rayuannya di bawah A 49 k 6 KMR. Pada 27 Disember 1993, penolong kanan pendaftar Mahkamah Tinggi telah menghantar sepucuk surat kepada peguamcara bagi kedua-dua pihak untuk memberitahu bahawa rekod itu telah diterima pada 15 Disember 1993. Rayuan itu kemudiannya ditetapkan untuk pembicaraan pada 7 Disember 1994. Pada 6 Disember 1994, peguamcara penentang telah menyampaikan satu notis bertulis bahawa mereka akan membuat satu bantahan permulaan terhadap rayuan itu atas alasan bahawa memorandum rayuan tidak disampaikan menurut A 55 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu'). Semasa perbicaraan, peguam perayu berhujah bahawa kesan A 49 k 6(3) KMR adalah untuk mengenepikan keperluan satu memorandum rayuan memandangkan rayuan itu hanya merupakan suatu perbicaraan semula permohonan penentang, dan sebelum itu tidak terdapat satu perbicaraan kerana ia adalah satu permohonan interlokutori. Walau bagaimanapun, hakim perbicaraan menolak rayuan itu dengan kos. Maka, perayu memohon untuk kebenaran untuk merayu terhadap keputusan Mahkamah Tinggi itu.

Diputuskan, menolak permohonan itu:

(1) Tujuan pindaan kepada A 49 k 6 KMR adalah untuk mengurangkan kelengahan yang diakibatkan dalam pendaftaran rayuan menerusi ketidakadaan alasan penghakiman dan nota keterangan yang boleh mengambil masa yang panjang dalam mahkamah rendah. Ini tidak bermakna bahawa kesan aturan itu adalah untuk mengenepikan keperluan untuk memorandum rayuan. Walaupun A 49 k 6(3) KMR mungkin boleh diungkapkan dengan lebih jelas, ianya tidak bermakna bahawa ia telah mengenepikan keperluan A 55 k 2 KMT.

(2) Maka, apabila borang 141 telah disampaikan pada peguamcara perayu pada 3 Januari 1994, mereka seharusnya mengambil

langkah lanjut dengan memfailkan dan menyampaikan memorandum rayuan dalam masa 14 hari selepas itu bersama dengan satu salinan rekod rayuan. Dalam keadaan kes ini, adalah tidak sesuai untuk memberikan kebenaran membuat rayuan. Sememangnya, permohonan yang betul di sini adalah untuk perlanjutan masa untuk memfailkan memorandum rayuan itu, dan permohonan itu sepatutnya dibuat dalam Mahkamah Tinggi.]

Notes

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

Siang Galau v Ang Wak Hiong [1994] 1 MLJ 42 (refd)
Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd [1995] 1 CLJ 113 (folld)

Legislation referred to

Rules of the High Court 1980 O 55
Subordinate Courts Rules 1980 O 26, O 49 r 6, Forms 140, 141

Appeal from: Civil Appeal No 11–21 of 1993 (High Court, Shah Alam)

Norhaslinda bte Salleh (*Xavier Rafie & Norhaslinda*) for the appellant.
James Edwin Pushparatnam (*James Edwin & Co*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA: This is an application for leave to appeal against the decision of the High Court judge at Shah Alam, dismissing the applicant's appeal. It has proven once again that O 49 r 6 of the Subordinate Courts Rules 1980 ('the SCR') is a trap for the unwary.

The respondent ('Webb') sued the appellant in the magistrates' court for RM23,000 special damages, interest and costs. The claim was based on an alleged breach of contract. The appellant filed a defence and counterclaim. Webb applied for and obtained summary judgment on 19 November 1993, pursuant to O 26 of the SCR.

On 29 November 1993 (ie within 14 days), the appellant filed and served her notice of appeal.

On 15 December 1993, she filed her appeal record pursuant to O 49 r 6 of the SCR. It reads as follows:

(1) Notwithstanding anything contained in this order, an appeal shall lie to a judge in chambers from any decision made by the court other that a decision made after trial.

(2) The appeal shall be brought by filling a notice of appeal in form 140 within 14 days from the day on which the decision was pronounced,

and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.

(3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of —

(a) the application for the decision;

(b) the statement of claim, and where defence had been filed, the statement of defence;

(c) all affidavits filed in support of or in opposition to the application; and

(d) the decision appealed from,

but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

The appeal record did not include the notes of evidence, grounds of judgment or any memorandum of appeal.

On 27 December 1993, the senior assistant registrar of the High Court sent a letter to the solicitors of both parties to say the record had been received on 15 December 1993 and the appeal had been registered as Rayuan Suit No 22–21–1993.

The appellant's solicitors did not take any further action. In due course, the appeal was fixed for disposal on 7 December 1994.

On 6 December 1994, Webb's solicitors served a written notice that they would take a preliminary objection to the appeal on the ground that the memorandum of appeal had not been served pursuant to O 55 of the Rules of the High Court 1980 ('the RHC').

This point was taken at the hearing the following day. The appellant's counsel submitted that the effect of O 49 r 6(3) of the SCR was to dispense with the need for a memorandum of appeal, since the appeal was merely by way of a rehearing of Webb's application and there had been no trial since this was an interlocutory application.

The trial judge did not agree and dismissed the appeal with costs. In order to mount an appeal against this decision, the appellant has come to us for leave.

Before us, appellant's counsel made the same submission she made in the court below. It did not find favour with us.

The issue is admirably covered in *Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113 by Richard Malanjum J. We entirely agree with what he has said.

Although O 49 r 6(3) could have been more clearly worded, it cannot be understood to mean that it has abrogated the requirement of O 55 r 2 of the RHC.

In the present case, form 141 was served on the appellant's solicitors on 3 January 1994. They should have followed up by filing and serving the memorandum of appeal within 14 days thereafter, together with a copy of the appeal record. This they did not do.

A The memorandum of appeal is not part of the appeal record (see *Siang Galau v Ang Wak Hiong* [1994] 1 MLJ 42). Regrettably, Webb's solicitors did not tell the appellant's solicitors on or about 18 January 1994 that they would take this objection. They waited till 6 December 1994.

By then, a whole year had elapsed, and without the memorandum it B is difficult to see how the trial judge could have done anything else but to dismiss the appeal.

The amendment to O 49 r 6 was brought into effect by PU (A)193/93. Its objective was to reduce the delay caused in the registration of appeals by the non-availability of the grounds of decision and notes of C evidence which can take a long time in the lower courts. So for orders obtained before trial, parties were allowed to compile the record by merely including the pleadings, affidavits, and the decision appealed from, together with the written application thereto. Once the appeal was registered, the grounds of judgment and notes of evidence could come later.

The present case shows the confusion that has arisen by the exclusion D provided. What appellant's counsel could have done in the High Court was to apply for an extension of time to file the memorandum. Bearing in mind the fact that notice of objection had been given only the day before, the High Court judge may readily have agreed.

In the circumstances, this was not a fit case to give leave to appeal. E The proper application here was for extension of time, and that application should have been made in the High Court.

So, we dismissed the application with costs.

Application dismissed.

F Reported by Mariette Peters-Goh

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